

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re

ROBERT BRADLEY VAN AMBERG
and JANICE BETH PARRISH
VAN AMBERG,

Debtors.

No. 94-20780
Chapter 13

M E M O R A N D U M

APPEARANCES:

DEAN GREER, ESQ.
Post Office Box 3708
Kingsport, Tennessee 37664
*Attorney for Robert Bradley Van Amberg
and Janice Beth Parrish Van Amberg*

RONALD E. CUNNINGHAM, ESQ.
R.O. SMITH, JR., ESQ.
FINKELSTEIN, KERN, STEINBERG & CUNNINGHAM
Post Office Box 1
Knoxville, Tennessee 37901
*Attorneys for NationsBank of South
Carolina, N.A.*

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

The issue to be decided in this case is whether a guarantor of a promissory note secured by collateral is a "debtor" under Article 9 of the Uniform Commercial Code such that upon default of the note, the guarantor is entitled to notice of the intended sale disposing of the collateral pursuant to TENN. CODE ANN. § 47-9-504(3). The court answers the question in the affirmative.

I.

This chapter 13 case was filed by the debtors on May 31, 1994, and the debtors' chapter 13 plan was thereafter confirmed by the court. Subsequent to the filing of the petition, NationsBank filed a proof of claim asserting that it held an unsecured claim against the debtors in the amount of \$8,557.95, representing the deficiency remaining after NationsBank's repossession and sale of a 1990 Chevrolet Lumina automobile, the payment of which had been guaranteed by debtor Robert Van Amberg. Thereafter, on December 1, 1994, NationsBank, through counsel, amended its proof of claim by increasing the amount of the claim to \$10,228.75.¹

On August 7, 1995, the debtors filed an objection to NationsBank's claim, asserting that NationsBank did not provide

¹The amended proof of claim provided no basis or explanation for the increased amount.

Robert Van Amberg "notice of the repossession or any notification of the time and place of any public sale or time at which a private sale or other intended disposition was to be made" of the automobile as required by TENN. CODE ANN. § 47-9-504(3). For relief, the debtors requested that the claim of NationsBank be disallowed. A hearing on the objection to claim was held on October 16, 1995, after which the court directed the parties to file post-trial briefs addressing the legal issue of whether a guarantor is entitled to notification by the secured party of any intended disposition of repossessed collateral. Briefs having now been filed, the issue is ready to be resolved. This is a core proceeding. 28 U.S.C. § 157(b)(2)(B).

II.

Debtor Robert Van Amberg was the sole witness at trial. The evidence presented therein established that prior to the bankruptcy filing, Mr. Van Amberg was president and a fifty percent shareholder of Huntingdon Windows, Inc., a home improvement business with offices in Hilton Head and Charleston, South Carolina. In August 1990, Huntingdon Windows, Inc., by Mr. Van Amberg acting as president, purchased a 1990 Chevrolet Lumina automobile financed through C&S Bank in Hilton Head. The loan was personally guaranteed by Mr. Van Amberg. Mr. Van

Amberg testified that he had conducted a great deal of banking with C&S Bank over several years, with both his business and personal accounts being handled by one particular employee at C&S Bank whom he had known for many years.

Shortly after the purchase of the automobile, Huntingdon Windows, Inc. closed its Hilton Head office and moved to Kingsport, Tennessee. Mr. Van Amberg testified that he notified C&S Bank of the move by the corporation and its new address in Tennessee. For the next couple of years after the move, the corporation made regular monthly payments on the automobile loan although it occasionally allowed some of the payments to lapse and become delinquent, prompting telephone calls from C&S Bank to the corporation at its Kingsport office inquiring about the delay in payment.

In July 1992, William John Hess, the other fifty percent shareholder of Huntingdon Windows, Inc., bought out Mr. Van Amberg's fifty percent interest in the corporation and became sole shareholder of the corporation. Notwithstanding that transaction, Huntingdon Windows, Inc. retained ownership and possession of the 1990 Chevrolet Lumina automobile financed through C&S Bank. Mr. Van Amberg testified that at the time of the transaction, he notified C&S Bank, which by that time had become NationsBank, that he no longer had any interest in the

corporation and that NationsBank should thereafter deal with Mr. Hess. Mr. Van Amberg stated that he believed the corporation was current on its monthly payments to NationsBank on the automobile loan at the time he transferred his interest in the corporation to Mr. Hess.

Some time thereafter, the corporation, unbeknownst to Mr. Van Amberg, defaulted on the automobile loan payments to NationsBank. The bank repossessed the automobile in November 1992 and sold it on December 1, 1992. By January 1993, Huntingdon Windows, Inc. was no longer in business, Mr. Hess having "loaded up the van" and "skipped town." Mr. Van Amberg testified that he had no knowledge of the default and subsequent repossession and sale until January 1993, when he received a letter from NationsBank dated January 20, 1993, addressed to him personally at his home address, seeking a deficiency balance of \$7,303.93. Mr. Van Amberg stated that had he known of the default, he would have made arrangements to obtain the automobile from the corporation and bring the payments current because he was in need of a car at that time. Mr. Van Amberg had no knowledge as to whether notice of the intended sale was given to Huntingdon Windows, Inc., but testified that if it had received such notice, no one from the corporation had in turn informed him.

III.

Mr. Van Amberg maintains that he was entitled to prior notice of the intended sale or disposition of the automobile pursuant to TENN. CODE ANN. § 47-9-504,² the statute which governs a secured party's right to dispose of collateral after default by providing in pertinent part the following:

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation

....

(3) Disposition of the collateral may be by public or private proceedings and may be by way of one (1) or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value

²Because the purchase of the 1990 Chevrolet Lumina took place in South Carolina and the guaranty agreement, out of which NationsBank's claim against Mr. Van Amberg arises, was executed in South Carolina by a South Carolina resident in favor of a South Carolina bank, it would appear that the disputes arising out of that transaction would be subject to application of South Carolina law. However, the debtors have maintained from the start that NationsBank did not comply with Tennessee law in the repossession and sale of the Lumina and NationsBank has never challenged the applicability of Tennessee law. To the contrary, both NationsBank and the debtors presented this matter to the court and briefed it as one governed by Tennessee law. In addition, neither NationsBank nor the debtors submitted into evidence any documents recording this transaction. As a result, the court will apply Tennessee law.

or is of a type customarily sold on a recognized market, **reasonable notification of a time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor**, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

TENN. CODE ANN. § 47-9-504 (emphasis supplied). Mr. Van Amberg contends that as a guarantor, he is a "debtor" as that word is used in TENN. CODE ANN. § 47-9-504(3) such that NationsBank was required to give him "reasonable notification of a time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition [of the collateral was] to be made." TENN. CODE ANN. § 47-9-504(3).

The word "debtor" is a term of art specifically defined for Article 9 purposes in TENN. CODE ANN. § 47-9-105(1)(d) which states:

"Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of the collateral in any provision of the chapter dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires.

Mr. Van Amberg asserts that a guarantor falls within the first sentence of the foregoing statute's definition of debtor – "person who owes payment or other performance of the obligation

secured." NationsBank disagrees, arguing that this sentence refers solely to the obligor in a secured transaction, which in the present case is Huntingdon Windows, Inc., and that "debtor" does not include guarantor. NationsBank asserts that there is no requirement in Article 9 of the Uniform Commercial Code mandating notice to a guarantor and, therefore, its failure to give Mr. Van Amberg notice of the collateral's sale³ provides no

³At the trial of this matter, NationsBank offered no evidence that it had attempted to provide Mr. Van Amberg prior notice of the collateral's sale, and relied solely on the defense that notice to a guarantor is not required. However, in its post-trial brief, NationsBank asserted that it sent notice of the repossession and pending sale by certified mail to Mr. Van Amberg at his last known address, but the notice was returned marked "Moved, Left No Address" because Mr. Van Amberg failed to keep NationsBank informed of his current address. The Van Ambergs, through counsel, moved to strike this assertion from NationsBank's brief, contending that this allegation was not supported by the record. By order entered December 1, 1995, the court granted the motion to strike because no evidence was presented at trial supporting NationsBank's claim that it had attempted to give Mr. Van Amberg notice.

In any event, the court is unconvinced that even if notice had been attempted as alleged in NationsBank's brief, such notice would have been sufficient to meet the requirements of TENN. CODE ANN. § 47-9-504(3). Mr. Van Amberg testified that NationsBank was aware of his home address from his other accounts at the bank and NationsBank's knowledge of his correct address was shown by the fact that in January 1993 NationsBank was able to contact him by letter at his home address to request payment of the deficiency. See *Mallicoat v. Volunteer Finance & Loan Corp.*, 415 S.W.2d 347 (Tenn. App. 1966), on reh'g, 1967 WL 9006 (Tenn. App. 1967)(creditor's notice by registered mail which was returned unclaimed was insufficient where debtor lived in same city as creditor's place of business and creditor had information as to where debtor was employed and where his parents lived); *First Tennessee Bank National Association v.* (continued...)

defense to its deficiency claim against the Van Ambergs.

Resolution of the issue of whether Mr. Van Amberg as a guarantor was entitled to notice of the sale of the 1990 Chevrolet Lumina automobile is critical to the allowance of NationsBank's claim. In Tennessee, every aspect of the disposition of collateral by a secured creditor must be "commercially reasonable." TENN. CODE ANN. § 47-9-504(3); *Chavers v. Frazier (In re Frazier)*, 93 B.R. 366, 368 (Bankr. M.D. Tenn. 1988), *aff'd*, 110 B.R. 827 (M.D. Tenn. 1989). TENN. CODE ANN. § 47-9-504(3)'s requirement that the debtor be given reasonable notice of the intended disposition is a necessary aspect of a commercially reasonable sale and a sale that does not include the required notice is not commercially reasonable. See *International Harvester Credit Corp. v. Ingram*, 619 S.W.2d 134, 137 (Tenn. App. 1981), *perm. to appeal denied*, (1981), *citing Mallicoat v. Volunteer Finance & Loan Corp.*, 415 S.W.2d 347 (Tenn. App. 1966), *on reh'g*, 1967 WL 9006 (Tenn. App. 1967). Once a determination is made that a sale was not commercially

³(...continued)
Helton, 03A01-9501-CV-00026, 1995 WL 515658 (Tenn. App. Aug. 31, 1995)(bank's notice to debtors' home address which was returned marked "unclaimed" was insufficient where bank had information as to where debtor husband was employed, and it had no difficulty contacting the debtors by telephone following the sale in order to advise them of the amount of the deficiency).

reasonable, a rebuttable presumption arises that the fair market value of the collateral equalled the indebtedness secured, including the amount sought as a deficiency. See *In re Frazier*, 93 B.R. at 372. "It is the burden of the secured party to rebut this presumption and failure to rebut the presumption with evidence of fair market value in the record results in denial of the secured party's claims for deficiency judgment." *Id.*

In other words, in order for a secured party to recover a deficiency after what has been deemed a commercially unreasonable sale, the secured party must rebut the presumption that the value of the collateral equalled the indebtedness secured by presenting proof that the fair market value of the collateral was obtained by the sale. See *Federal Deposit Insurance Corp. v. Morgan*, 727 S.W.2d 500, 502 (Tenn. App. 1986), *app. for appeal denied*, (1987), *citing U.S. v. Willis*, 593 F.2d 247, 260 (6th Cir. 1979). If no proof of value is presented, the court must presume that a commercially reasonable sale would have fully satisfied the debt and disallow the deficiency claim. See *First Tennessee Bank National Association v. Helton*, 03A01-9501-CV-00026, 1995 WL 515658 (Tenn. App. Aug. 31, 1995); *Morgan*, 727 S.W.2d at 502.

At trial, NationsBank neither offered any evidence of the fair market value of the 1990 Chevrolet Lumina automobile nor

any proof that NationsBank's sale of the automobile resulted in the recovery of its fair market value. Accordingly, if this court determines that Mr. Van Amberg as a guarantor was a "debtor" as contemplated by Article 9 of the Uniform Commercial Code and was therefore entitled to notice such that failure to give him notice resulted in a commercially unreasonable sale, the presumption that a commercially reasonable sale would have fully satisfied the debt controls and mandates the disallowance of NationsBank's claim, NationsBank having presented no proof to rebut the presumption.

Surprisingly, there are no reported decisions from Tennessee courts ruling on the issue of whether a guarantor is a debtor for the purposes of Article 9. As the Van Ambergs observe in their brief, there are Tennessee cases involving challenges by guarantors of the commercial reasonableness of sales of collateral as defenses to deficiency actions. See, e.g., *Automotive Financial Services, Inc. v. Youngblood (In re Youngblood)*, 167 B.R. 870 (Bankr. W.D. Tenn. 1994); *Morgan*, 727 S.W.2d at 500. But neither the issue of notice nor the standing of the guarantor to raise the commercial unreasonableness of the sale of the collateral was raised in those cases.

Fortunately, numerous other jurisdictions, including all

eight states adjoining Tennessee,⁴ have generated a wealth of reported decisions considering the precise issue of whether a guarantor is a "debtor" as this word is defined in U.C.C. § 9-105 and applied in U.C.C. § 9-504(3) as those provisions have been adopted by the respective states. The courts which have ruled on this issue have been virtually unanimous in their conclusion that a guarantor is a "debtor" within the meaning of U.C.C. §§ 9-105 and 9-504 and, as a result, is entitled to notice prior to the disposition of collateral. See Annotation, *Construction of Term "Debtor" as Used in UCC § 9-504(3), Requiring Secured Party to Give Notice to Debtor of Sale of Collateral Securing Obligation*, 5 A.L.R. 4th 1291 (1994 supp.). For the most part, these courts have agreed with the Van

⁴ALABAMA: *Prescott v. Thompson Tractor Co., Inc.*, 495 So. 2d 513 (Ala. 1986); *First Alabama Bank of Montgomery v. Parsons*, 390 So. 2d 640 (Ala. Civ. App. 1980), appeal after remand, 426 So. 2d 416 (Ala. 1982). ARKANSAS: *Hallmark Cards, Inc. v. Peevy*, 739 S.W.2d 691 (Ark. 1987); *Norton v. National Bank of Commerce of Pine Bluff*, 398 S.W.2d 538 (Ark. 1966). GEORGIA: *U.S. v. Kennedy (In re Kennedy)*, 806 F.2d 1014 (11th Cir. 1986)(construing Georgia law). KENTUCKY: *Central Bank & Trust Co. v. Metcalfe*, 663 S.W.2d 957 (Ky. Ct. App. 1984). MISSISSIPPI: *U.S. v. Bryant*, 628 F.Supp. 1444 (N.D. Miss. 1986)(construing Mississippi law). MISSOURI: *Mercantile Bank of Joplin, N.A. v. Nicsinger (In re Nicsinger)*, 136 B.R. 228 (W.D. Mo. 1992); *Lankheit v. Estate of Scherer*, 811 S.W.2d 853 (Mo. Ct. App. 1991). NORTH CAROLINA: *Gregory Poole Equip. Co. v. Murray*, 414 S.E.2d 563 (N.C. Ct. App. 1992). VIRGINIA: *Rhoten v. United Virginia Bank*, 269 S.E.2d 781 (Va. 1980).

Ambergs' contention that a guarantor falls within the first sentence of the definition of "debtor." "Because a guarantor stands in the shoes of the debtor with respect to liability, a guarantor who unconditionally guarantees the debt of another 'owes payment or other performance of the obligation secured.'" *Gregory Poole Equipment Co. v. Murray*, 414 S.E.2d 563, 566 (N.C. Ct. App. 1992); see also *American Seaway Foods, Inc. v. Belden South Associates Limited Partnership*, 651 N.E.2d 941, 944 (Ohio 1995), *reconsideration denied*, 654 N.E.2d 989 (1995); *Hallmark Cards, Inc. v. Peevy*, 739 S.W.2d 691, 693 (Ark. 1987); *Chase Manhattan Bank, N.A. v. Ntarelli*, 401 N.Y.S.2d 404, 412 (N.Y. Sup. Ct. 1977).

These courts have concluded that requiring notice to a guarantor of the sale of collateral is consistent with the underlying purposes of the notice provision – providing the person liable on the debt with an opportunity to reduce his potential liability by paying the debt, finding a buyer or bidding at the sale so that the collateral is not sacrificed by a sale at less than its true value. *Gregory Poole*, 414 S.E.2d at 566. Because a guarantor is liable for any deficiency remaining after the sale of the collateral and has a substantial interest in achieving the best possible disposition of the collateral, the guarantor should similarly be permitted to

protect his rights. *American Seaway Foods*, 651 N.E.2d at 945; *Rhoten v. United Virginia Bank*, 269 S.E.2d 781, 784 (Va. 1980).

As stated in the respected treatise on the Uniform Commercial Code by Professors White and Summers:

"Guarantors" and "sellers" of chattel paper with recourse have a financial stake in the creditor's disposition or sale of the collateral that is identical to the debtors' interest - liability for a deficiency. Consequently, these parties deserve the same notice protection that the Code gives the debtor, at least where the secured party has knowledge of the non-owner debtor's potential liability if the primary debtor defaults.

2 WHITE & SUMMERS, UNIFORM COMMERCIAL CODE § 27-12 (3rd ed. 1988); see also BARKLEY CLARK, THE LAW OF SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE ¶ 4.03[3][b] (1993 rev. ed.) ("Requiring notice to the guarantor makes policy sense. Like the borrower, the guarantor has a strong interest in seeing that the foreclosure sale brings the highest possible price, in order to limit the size of any deficiency.").

Several of the courts have based their decisions on equity, recognizing that the interests of guarantors and debtors on matters affecting the disposition of collateral are so similar "that simple fairness requires that the term 'debtor' to whom notice is required include one who is responsible for payment upon default of the principal obligor." *Hallmark Cards*, 739 S.W.2d at 693; see also *Gregory Poole*, 414 S.E.2d at 566;

Hepworth v. Orlando Bank & Trust Co., 323 So. 2d 41, 43 (Fla. Ct. App. 1975), *reh'g denied*, (Fla. Ct. App. 1975) ("fundamental principles of equity and fairness urge that the secured party give a guarantor notice of the sale of collateral securing the promissory note").

Of the more than three dozen cases cited in the A.L.R. annotation dealing with this issue, only four have held that a guarantor does not come within the definition of debtor for purposes of the notice provisions of Article 9: *Community Bank & Trust Co. v. Copses*, 953 F.2d 133 (4th Cir. 1991)(applying North Carolina law); *Rutan v. Summit Sports, Inc.*, 219 Cal. Rptr. 381 (Cal. Ct. App. 1985), *as modified*, (Cal. Ct. App. 1985); *Bennett v. Union Nat'l Bank & Trust Co.*, 315 S.E.2d 431 (Ga. Ct. App. 1984), *reh'g denied*, (Ga. Ct. App. 1984); *Brinson v. Commercial Bank*, 225 S.E.2d 701 (Ga. Ct. App. 1976), *reh'g denied*, (Ga. Ct. App. 1976).

In the *Copses* case, the Fourth Circuit Court of Appeals applied what it believed to be North Carolina law. However, its ruling was in effect overruled by the decision of the North Carolina Court of Appeals in *Gregory Poole*. Similarly *Bennett* and *Brinson*, the two Georgia Court of Appeals cases rejecting the "guarantor is a debtor" conclusion, were overruled by the

Georgia Supreme Court in *U.S. v. Kennedy*, 348 S.E.2d 636 (1986), upon certification of the question by the 11th Circuit Court of Appeals in *U.S. v. Kennedy (In re Kennedy)*, 785 F.2d 1553 (11th Cir. 1986). The California appellate court case of *Rutan*, the remaining case contrary to the majority view, was considered and rejected by three other California sister appellate courts along with the Ninth Circuit Court of Appeals (applying California law). See *Connolly v. Bank of Sonoma County*, 229 Cal. Rptr. 396 (Cal. Ct. App. 1986), *reh'g denied and review denied*, (Cal. Ct. App. 1986); *C.I.T. Corp. v. Anwright Corp.*, 237 Cal. Rptr. 108 (Cal. Ct. App. 1987), *review denied*, (Cal. Ct. App. 1987); *American Nat. Bank v. Perma-Tile Roof Co.*, 246 Cal. Rptr. 381 (Cal. Ct. App. 1988); *Security Pacific National Bank v. Kirkland (In re Kirkland)*, 915 F.2d 1236 (9th Cir. 1990).

The basic premise of all the cases expressing the minority view is its interpretation that the "debtor" as defined in U.C.C. § 9-105 refers solely to the obligor on the promissory note. This court does not construe the term "debtor" so narrowly and concludes that a guarantor clearly falls within the definition of debtor as defined in § 9-105 because a guarantor "owes payment ... of the obligation secured."

This court is further persuaded that a Tennessee state court

ruling on this issue would similarly hold that a guarantor is a debtor within the meaning of Article 9 of the Uniform Commercial Code and, therefore, is entitled to the protections set forth therein. As acknowledged by one Tennessee court, the Uniform Commercial Code is to be liberally construed and applied to promote its underlying purposes and policies. *American City Bank of Tullahoma v. Western Auto Supply Co.*, 631 S.W.2d 410, 417 (Tenn. App. 1981). The Tennessee Court of Appeals has observed that the notice requirement "should be construed and applied in a manner to effectuate [its] salutary purpose and in light of Tennessee law." *Mallicoat*, 415 S.W.2d at 350. The importance of providing such notice is emphasized by the fact that the lack thereof is *prima facie* evidence of a commercially unreasonable sale. See *International Harvester*, 619 S.W.2d at 137. And as in other jurisdictions, Tennessee has recognized that the purpose of the notice provision "is to enable the debtor to protect his interest in the property by paying the debt, finding a buyer or being present at the sale to bid on the property or have others do so, to the end that it be not sacrificed by a sale at less than its true value." *Id.* Certainly these interests are equally shared by a guarantor who will likewise be responsible for any deficiency remaining after the sale.

IV.

Because this court finds that NationsBank was required by TENN. CODE ANN. § 47-9-504 to give Mr. Van Amberg as guarantor notice of the sale of the 1990 Chevrolet Lumina automobile, but failed to do so, NationsBank's sale of the collateral is deemed to be commercially unreasonable and there is a presumption that the fair market value of the collateral equalled the indebtedness owed to NationsBank. It was NationsBank's burden to rebut this presumption. Since NationsBank did not present any evidence that its disposition of the 1990 Chevrolet Lumina automobile resulted in the recovery of the fair market value of the vehicle and instead proceeded solely on its theory that a guarantor is not a debtor, the presumption that the indebtedness was equal to the fair market value of the collateral stands. NationsBank is accordingly not entitled to any deficiency against debtor Robert Van Amberg and its proof of claim, as amended, must be disallowed.

An order will be entered in accordance with this memorandum.

FILED: December 6, 1995

BY THE COURT

MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE